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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92059305
Party	Plaintiff MWR Holdings, LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

MWR HOLDINGS, LLC,

Petitioner,

v.

THEODORE A. STONER,

Registrant.

Cancellation No. 92059305

Mark: BONGO BI-LINGO BUDDY

Reg. No.: 3,700,403

Registered: October 20, 2009

**PETITIONER’S OPPOSITION TO STONER’S CROSS-MOTION FOR SUMMARY
JUDGMENT**

Petitioner MWR Holdings, LLC (“Petitioner”), by its undersigned counsel, submits this memorandum of law and supporting exhibits in opposition to Registrant Theodore A. Stoner’s (“Stoner”) cross-motion for summary judgment. As set forth more fully below, Stoner’s motion for summary judgment is based on the thinnest evidentiary basis, and Stoner has failed to meet his summary judgment burden in support of any of his arguments. Petitioner has also submitted substantial evidence to create a genuine issue of material fact in response to each of Stoner’s arguments, and Stoner’s cross-motion for summary judgment should be denied in its entirety.

STATEMENT OF MATERIAL FACTS IN DISPUTE

The following material facts are in dispute:

Disputed Fact No. 1. Whether Stoner has ever used the BONGO BI-LINGO BUDDY trademark in connection with “Entertainment in the nature of live theatrical performances by mixed media of live characters, puppetry and animation for children; Organizing cultural events

for children; Education services, namely, providing professional training in the field of bilingual learning” (hereinafter, the “‘403 Services”). (Stoner’s Statement of Facts No. 1).

On October 2, 2014, Petitioner served a first set of interrogatories on Stoner, including Interrogatory No. 5 requesting: “For each month from Registrant’s date of first use of Registrant’s Mark until the present, state the sales volume of services provided by Registrant under Registrant’s Mark.” (Declaration of William W. Stroeever (hereinafter, the “Stroeever Decl.”) at Exh. 1). On March 11, 2015, Stoner responded to Petitioner’s interrogatories, including the following response to Interrogatory No. 5: “Registrant does not have any sales figures relating to Registrant’s Services at issue in this proceeding as the International Class 41 services are offered to promote Registrant’s Mark in connection with Registrant’s other goods.” (Stroeever Decl. at Exh. 2).

Also on October 2, 2014, Petitioner served a first set of document requests on Stoner, including requests directed to, *inter alia*, each occasion on which Stoner provided the ‘403 Services under the BONGO BI-LINGO BUDDY mark (Request No. 3), to Stoner’s alleged first use of his mark anywhere (Request No. 4), to Stoner’s alleged first use of the mark in commerce (Request No. 5), to any advertising conducted by Registrant relating to Stoner’s mark (Request No. 8), and Stoner’s claim that he had used the BONGO BI-LINGO BUDDY mark with each of the ‘403 Services (Request No. 10). (Stroeever Decl. at Exh. 3). In response to those requests, and as set out more fully in Petitioner’s Argument section below, Stoner failed to produce any documents showing that he had ever used the BONGO BI-LINGO BUDDY mark for the ‘403 Services.

Disputed Fact No. 2. Whether Stoner first used and licensed the BONGO BI-LINGO BUDDY trademark in connection with the ‘403 Services in interstate commerce as early as June 8, 2004. (Stoner’s Statement of Facts No. 2).

Petitioner incorporates by reference the evidence cited in response to Disputed Fact No. 1. In addition, Petitioner notes the inconsistency in Stoner’s undisputed facts, namely, that in Fact No. 2, he claims that the BONGO BI-LINGO BUDDY mark was used in interstate commerce as early as June 8, 2004, and that in Fact No. 8, he declared in his Statement of Use that the first use of the BONGO BI-LINGO BUDDY mark in commerce was June 18, 2008.

Disputed Fact No. 3. Whether, since first allegedly offering goods under Registrant’s Mark around June 8, 2004, Stoner’s use of the BONGO BI-LINGO BUDDY trademark in connection with the ‘403 Services has been continuous and uninterrupted. (Stoner’s Statement of Facts No. 3).

Petitioner incorporates by reference the evidence cited in response to Disputed Fact No. 1. Petitioner also notes that the ‘403 Registration identifies only a single class of services (i.e., Class 041) and no goods. Accordingly, Stoner’s Statement of Fact No. 3 which states that Stoner first offered *goods* around June 8, 2004, is disputed on its face.

Disputed Fact No. 4. Whether Stoner has never ceased use of the BONGO BI-LINGO BUDDY trademark in connection with the ‘403 Services nor retained an intent to abandon or relinquish the same. (Stoner’s Statement of Facts No. 3).

Petitioner incorporates by reference the evidence cited in response to Disputed Fact No. 1. There is no evidence that Stoner has begun use of the BONGO BI-LINGO BUDDY trademark

in connection with the ‘403 Services. There is also no evidence of the continuous use of the BONGO BI-LINGO BUDDY trademark in connection with the ‘403 Services.

Disputed Fact No. 5. Whether Petitioner can establish a date of first use prior to Stoner’s alleged first use of the BONGO BI-LINGO BUDDY trademark in connection with the ‘403 Services.¹

Petitioner incorporates by reference the evidence cited in response to Disputed Fact No. 1. In addition, on December 18, 2013, Petitioner filed a U.S. trademark application for the trademark BONGO BEAR, which was given Serial No. 86/146,757. (Declaration of Michael A. Shafir, hereinafter the “Shafir Decl.”, at ¶ 3). Petitioner’s BONGO BEAR application was filed based on use in commerce, and included dates of first use anywhere and in commerce of at least as early as March 1, 2003. (Shafir Decl. at ¶ 4). The information in Petitioner’s BONGO BEAR application was verified by a declaration included in the application, signed by Petitioner’s attorney at the time, John G. Tutunjian. (Shafir Decl. at ¶ 5). Petitioner uses the BONGO BEAR trademark as part of its MUSIC 4 ME program, to help children expend energy in a positive way through musical instruments and playing fun songs. (Shafir Decl. at ¶ 6). Petitioner has used the BONGO BEAR trademark in connection with “entertainment services, namely live theatrical performances featuring electronically animated characters for use in child development and personal appearances by a costumed character” since at least as early as March 1, 2003 and continuously thereafter. (Shafir Decl. at ¶ 7). Petitioner produced several documents showing the mark as actually used in the sale or advertising of the services recited in Petitioner’s BONGO BEAR trademark application. (Shafir Decl. at ¶ 8).

¹ Petitioner submits that the facts are actually undisputed in favor of Petitioner – i.e., that Petitioner has priority of trademark rights over Stoner.

ARGUMENT

The purpose of summary judgment is to avoid an unnecessary trial by enabling an expeditious procedure whereby, for issues on which there is no material factual dispute, the court can decide the controversy by applying the law to the undisputed facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The party seeking summary judgment always bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). *See also, Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970) (unless movant meets initial burden, summary judgment must be denied even if no opposing evidentiary matter is presented). The summary judgment burden is a heavy burden, and cannot be met with equivocal evidence. *BBS Norwalk One, Inc. v. Raccolta, Inc.*, 117 F.3d 674, 677 (2d Cir. 1997). All evidence must be viewed in the light most favorable to the party opposing the motion, and reasonable inferences made in favor of the non-movant. *Simms v. Oklahoma ex rel. Department of Mental Health and Substance Abuse Services*, 165 F.3d 1321, 1326 (10th Cir. 1999). If and only if the movant meets its initial burden does the burden shift to the non-movant to set out specific facts showing a genuine issue for trial. *See, e.g., Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1368 (Fed. Cir. 2006). Indeed, the Federal Circuit has cited the principle that a non-movant is required to provide opposing evidence under Rule 56(e) only if the moving party has provided evidence sufficient, if unopposed, to prevail as a matter of law. *Id.* at 1369.

In this case, each of Stoner's summary judgment arguments is unsupported by sufficient evidence to meet Stoner's initial burden, and his motion could be denied in its entirety on those

grounds. Notwithstanding that, there is substantial evidence of record in this case to create genuine issues of material fact such that summary judgment in favor of Stoner is inappropriate.

A. The Board Should Deny Stoner's Motion for Summary Judgment that Stoner Did Not Abandon His Mark.

Stoner's first argument in his cross-motion for summary judgment seeks judgment that Stoner has not abandoned the '403 Registration. A registered trademark is considered abandoned if its use has been discontinued with intent not to resume such use. 15 U.S.C. § 1127. Nonuse for three consecutive years shall be *prima facie* evidence of abandonment. *Id.* A showing of a *prima facie* case creates a rebuttable presumption that the trademark owner has abandoned the mark without intent to resume use. *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1087 (Fed. Cir. 2000). In his motion for summary judgment, Stoner has the burden of showing that there is no genuine issue of material fact as to Stoner's use of the BONGO BI-LINGO BUDDY mark during any three-year period following registration of his mark. Stoner has failed to meet that burden.

1. Stoner has not come forward with any admissible material evidence.

First, Stoner has come forward with no admissible evidence in support of his summary judgment motion on the issue of abandonment. To establish an absence of any genuine issue of material fact, Stoner was required to identify the portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Instead, Stoner has cited two of his own self-serving interrogatory responses unsupported by any evidence, and a handful of documents with no supporting affidavit or declaration. None of these constitute admissible or material evidence under either the Federal or TTAB rules.

While interrogatory responses can sometimes serve as summary judgment evidence, Stoner has attempted to introduce his own responses, which are conclusory and not substantiated by actual evidence. These interrogatory responses cannot serve as evidence to resolve all possible material issues of fact. *Cf., Carter v. Clark County*, 459 Fed. Appx. 635, 636 (9th Cir. 2011). In *Carter v. Clark County*, for example, the Ninth Circuit affirmed a decision refusing to find a genuine issue of material fact where the only evidence submitted by the nonmovant was “his vague, conclusory answers to [the movant’s] interrogatories,” instead finding the responses uncorroborated and self-serving. *Id.* Just like in *Carter*, Stoner is trying to rely on his own self-serving interrogatories. However, unlike *Carter*, Stoner is the movant here and is not even entitled to reasonable inferences in his favor. Stoner’s conclusory statements cannot serve as evidence that Stoner has used the BONGO BI-LINGO BUDDY mark with the ‘403 Services, and they do not meet Stoner’s summary judgment burden.

Stoner has also attempted to support his motion for summary judgment with a handful of documents he produced during discovery. These documents are submitted without any supporting declaration or affidavit explaining their context or establishing their admissibility, as required by the Federal and TTAB rules, and should not be considered by the Board. *See, e.g., TBMP* § 528.05(a), 528.05(b).

Stoner may argue that even though he has come forward with no admissible evidence, he is still entitled to summary judgment on the mistaken position that all he is required to do is to show an absence of evidence supporting Petitioner’s position. However, a mere conclusory statement that the other side has no evidence is insufficient to shift the burden to the non-moving party to go beyond the pleadings to show specific facts creating a genuine issue for trial. *Ashe v. Corley*, 992 F.2d 540, 544 (5th Cir. 1993). Nor do conclusory statements and testimony based

merely on subjective belief constitute competent summary judgment evidence. *Rice v. United States*, 166 F.3d 1088, 1092 (10th Cir. 1999). It was Stoner's initial burden to show that summary judgment is appropriate on the question of abandonment, and Stoner has failed to meet that burden.

2. Even considering Stoner's documents and exhibits on their face, they do not meet Stoner's summary judgment burden.

Even assuming, for the sake of argument, that Stoner's evidence is admissible and of the type that could be considered by the Board in the context of Stoner's summary judgment motion, these documents still do not show the absence of any genuine issue of material fact.

Stoner's first interrogatory responses (to Petitioner's Interrogatory Nos. 2-3), simply state that Stoner's alleged date of first use is June 8, 2004, and include a sentence identifying what that alleged use was. (Stroeve Decl. at Exh. 2). Even if these responses are considered as evidence without any supporting documentation, they are immaterial to the question of abandonment as they only deal with Stoner's alleged first use, rather than his cessation of use. Stoner's second cited interrogatory response (to Petitioner's Interrogatory No. 9) is similarly unhelpful, as it states in a conclusory manner, and with no supporting evidence that, "Registrant has spent about \$5,000 average annually since first beginning to use Registrant's Mark in advertising and promotion expenditures." (Stroeve Decl. at Exh. 2). The lack of any supporting documentation is fatal to Stoner's assertion of continuous advertising. If Stoner has spent \$5,000 on advertising the BONGO BI-LINGO BUDDY mark for the '403 Services for every year since 2004 (presumably including this past year while the cancellation has been pending), where is the evidence of this advertisement? Where are the invoices for that \$5,000, or copies of the advertisements themselves? The only reasonable inference to draw from this lack of evidence is

that Stoner was not actually advertising the BONGO BI-LINGO BUDDY mark for the ‘403 Services.

In addition, even assuming Stoner’s interrogatory response is true, this response does not foreclose the possibility that Stoner stopped using the BONGO BI-LINGO BUDDY mark for a period of three years at some point since 2004, nor does it establish that he used his mark continuously from 2004 to the present. Viewing this alleged evidence in the light most favorable to Petitioner, it does not show that there are no genuine issues of material fact on the question of abandonment.

Nor do the documents referenced in Stoner’s motion establish that there is no genuine issue of material fact as to whether Stoner abandoned the BONGO BI-LINGO BUDDY mark with respect to the ‘403 Services. The documents are submitted with no context or explanation except the conclusory statement that “[t]hese show that Registrant has advertised and rendered Registrant’s services.” (Stoner’s Brief in Support of his Motion for Summary Judgment, D.E. 18 (hereinafter “Stoner Brief”) at 11). On the contrary, and even assuming the documents were accepted into evidence, they fail to show that Stoner used his mark in connection with the ‘403 Services at all, much less continuously since 2004.

Stoner argues that an article he produced as document number 000068-000070 (attached to Petitioner’s Reply in Support of Its Motion for Summary Judgment, D.E. # 19 (hereinafter “Petitioner’s Reply”) at Exh. J) demonstrates that he has rendered the ‘403 Services in commerce. However, the only reference of any kind made to Stoner in this article is a portion of one sentence: “...and Bongo Cats were dancing around the show floor (or was that us every time we heard their salsa beat?)” This “evidence” does not even mention the BONGO BI-LINGO BUDDY mark, does not mention any services of any kind being provided by Stoner, and

provides no information of any kind to support the claim that Stoner was using the mark in commerce. Again, even if this document was properly made of record, and viewing the document in the light most favorable to Petitioner, it establishes no fact of any relevance to this case, much less resolves any genuine issue of fact.

Stoner also directs the Board to a set of two pictures, produced as document numbers 000085 and 000086 (Petitioner's Reply at Exh. K). The documents were not submitted with any affidavit to provide a foundation for the pictures. They also contain no dates that might show whether they pertain to activities taken before or after the registration date. They are not produced with any kind of context by a person with knowledge as to what is taking place in the pictures. In short, these pictures have no evidentiary value of any kind in the context of this summary judgment motion, other than that at some point in time, a group of people gathered in a room with a person dressed as a cat.

Two other documents Stoner brings to the Board's attention are documents 000107 and 000110 of Stoner's document production (Petitioner's Reply at Exh. F). Significantly, however, these documents *contain no dates*. Without any way of knowing when the documents were created, these documents cannot serve as evidence that Stoner was using or advertising its mark for any three consecutive years since 2004². Indeed, with eleven years since 2004 and six years since the mark's registration in 2009, it would be impossible for these two documents to cover every three-year period in that span. It would have been a mere formality for Stoner to include a declaration as to when these documents were created, or even make a statement in the motion as to when they were created. A declaration would also have been useful to help establish whether

² Petitioner notes that document number 000110 contains a copyright date of 1999 for the image of a cat, but Stoner has not alleged use of his BONGO BI-LINGO BUDDY mark until 2004 so this cannot be the date of the document as a whole.

these proposed events even took place. The fact that Stoner did not include such a declaration, or introduce the documents through a declaration, creates an inference in favor of Petitioner.

Another document proffered by Stoner to demonstrate his purported advertisement of the mark in connection with the ‘403 Services is document 000109 of Stoner’s document production (Petitioner’s Reply at Exh. G). However, nowhere in this document does it even make mention of the ‘403 Services. In fact, the document explicitly lists “product categories available for licensing” by Stoner, and the ‘403 Services are not included in that list. Even properly made of record, this document cannot serve as evidence that Stoner was using the ‘403 Services, especially when viewed in the light most favorable to Petitioner. If anything, document 000109 is evidence that Stoner was *not* using the ‘403 Services as of June 10, 2004 because he does not list the ‘403 Services as being available for licensing.

Finally, Stoner points to document 000111 of his document production (Petitioner’s Reply at Exh. H) to show advertisement of the ‘403 Services, and yet this document uses neither the mark BONGO BI-LINGO BUDDY nor makes any mention of the ‘403 Services. Clearly, this document does not serve as evidence that Stoner was using the BONGO BI-LINGO BUDDY mark in connection with the ‘403 Services at any time, or as evidence of any fact relevant to this proceeding.

Stoner admitted in his moving brief that his burden was to “establish continuous use of its mark for all of the goods [sic] named in the registration, or that it has not ceased use without an intent to resume use.” Stoner Brief in Support of Motion, D.E. 18 at 11. This handful of documents does not meet that burden, and Stoner’s motion for summary judgment should be denied.

3. Petitioner has proffered sufficient evidence to create a genuine issue of material fact.

Even if the Board considers Stoner's materials as admissible evidence, and even if the Board finds that Stoner has met his initial burden and shifted the burden to Petitioner, Stoner's motion for summary judgment should still be denied because of Petitioner's evidence that Stoner has in fact abandoned the BONGO BI-LINGO BUDDY mark. First, Stoner has admitted that he "does not have any sales figures relating to Registrant's Services at issue in this proceeding as the International Class 41 services are offered to promote Registrant's Mark in connection with Registrant's other goods." (Stroeever Decl. at Exh. 2). Viewed in the light most favorable to Petitioner, this is a clear admission by Stoner that he has never sold the '403 Services under the BONGO BI-LINGO BUDDY mark, and is a further admission that the '403 Services have only been provided as advertising for Stoner's other goods, and not in commerce for their own sake. Stoner's own admissions create a genuine issue of material fact as to whether he has even ever used the BONGO BI-LINGO BUDDY mark in connection with the '403 Services.

In addition, Stoner's inability to produce any documents showing use of his mark in commerce itself creates a genuine issue of material fact. Stoner alleges that he has used his mark since 2004, and further alleges as part of his motion for summary judgment that said use has been continuous since that time. Despite that lengthy period of alleged use, Stoner has been entirely unable to produce a single document showing that the BONGO BI-LINGO BUDDY mark was used in commerce in connection with the '403 Services - no order forms, no invoices, no scripts or playbills to be used for live theatrical performances, no textbooks or lessons showing that he was providing professional training in the field of bilingual learning. The only reasonable inference from this lack of production (which must be made in favor of Petitioner) is that Stoner does not have these documents because he has not made use of the BONGO BI-

LINGO BUDDY mark in connection with the ‘403 Services. For all of these reasons, the Board should deny Petitioner’s Motion for Summary Judgment.

B. The Board Should Deny Stoner’s Motion for Summary Judgment that Stoner Did Not Commit Fraud on the USPTO.

Stoner’s cross-motion for summary judgment on the issue of fraud on the USPTO is conclusory, like his other arguments, and similarly does not establish the absence of a genuine fact issue. Petitioner has pleaded that Stoner committed fraud on the USPTO in filing a Statement of Use despite the fact that he had not yet used the BONGO BI-LINGO BUDDY mark for the ‘403 Services. Stoner’s cursory argument contends that he did not commit fraud on the USPTO in filing his Statement of Use because he alleges that his BONGO BI-LINGO BUDDY mark was being used in connection with the ‘403 Services prior to that filing. For all the reasons set out herein, there are several genuine issues of material fact as to whether Stoner has committed fraud on the USPTO.

A trademark applicant commits fraud when he knowingly makes false, material representations of fact in connection with an application for a registered mark. *Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.*, 522 F.3d 1200, 1209 (11th Cir. 2008). Fraud further requires a purpose or intent to deceive the USPTO in the application for the mark. *In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009). In making his motion for summary judgment, Stoner had the burden of showing that there is no genuine issue of material fact as to whether he committed fraud on the USPTO. Stoner cites to the same “evidence” on this issue as he did in connection with the abandonment issue, again concluding that he used the BONGO BI-LINGO BUDDY mark in connection with the ‘403 Services: “continuously on multiple occasions”. (Stoner Brief at 12). For the same reasons set out above, the Board should not admit these materials as

evidence of record. Stoner has not come forward with any admissible material evidence to support his motion on the issue of fraud.

Stoner's sole argument in support of his motion that he has not committed fraud on the USPTO is that his BONGO BI-LINGO BUDDY mark was in continuous use for the '403 Services since 2004. Again, though, even if the Board does admit Stoner's evidence, that evidence does not support Stoner's claim that he used the BONGO BI-LINGO BUDDY mark for the '403 Services prior to the September 1, 2009 filing of the Statement of Use. The evidence, when viewed in the light most favorable to Petitioner, does not establish that Stoner used his mark at all. Several of the documents have no dates of any kind, and since none of Stoner's purported evidence was introduced by way of a fact witness declaration, there is no context to provide those dates. (See, for example, Stoner documents 000107 and 000110, Petitioner's Reply at Exh. F). These documents do not establish that Stoner's mark was used for the '403 Services prior to September 1, 2009, especially when viewed in the light most favorable to Petitioner. Other documents proffered by Stoner either make no reference to the '403 Services, or no reference to the BONGO BI-LINGO BUDDY mark, or both. (See, for example, documents 000109, 000111, 000068-000070, 000085, and 000086). (Petitioner's Reply at Exhs. G, H, J, K). Again, these documents, even if they had been properly admitted as evidence, would not establish that Stoner used his BONGO BI-LINGO BUDDY mark in commerce in connection with the '403 Services, much less that such use was made prior to the September 1, 2009 deadline. In short, even assuming Stoner's evidence was properly admitted, it does not show that Stoner used his mark in commerce prior to the filing of the Statement of Use, and does not meet Stoner's summary judgment burden.

On the contrary, the evidence when viewed in the light most favorable to Petitioner demonstrates a genuine issue of material fact as to whether Stoner committed fraud on the USPTO. As established above through various evidence such as Stoner's admission that he has no sales of the BONGO BI-LINGO BUDDY mark for the '403 Services (Stroeever Decl. at Exh. 2), Stoner's admission that he used the BONGO BI-LINGO BUDDY mark only to advertise his other goods, rather than the '403 Services (Stroeever Decl. at Exh. 2), and Stoner's failure to produce any document showing use of the BONGO BI-LINGO BUDDY mark with the '403 Services prior to September 1, 2009, there is a genuine issue of material fact as to whether Stoner's Statement of Use was a false representation of fact. Stoner's '403 Registration would not have issued but for the filing of this Statement of Use (*see* TMEP § 1103), which makes this false misrepresentation material. Stoner filed the application that matured into the '403 Registration himself, as well as the Statement of Use, such that the misrepresentation was made knowingly. In addition, purpose or intent can be inferred, viewing the facts in the light most favorable to Petitioner, on the fact that Stoner was aware that he (allegedly) was only using the BONGO BI-LINGO BUDDY mark with the '403 Services to advertise his other goods. Petitioner's evidence creates a genuine issue of material fact as to the question of whether Stoner committed fraud on the USPTO, and Stoner's motion for summary judgment must be denied.

C. The Board Should Deny Stoner's Motion for Summary Judgment that Petitioner Cannot Prove Priority of Use of Petitioner's Mark Over Registrant's Use of Registrant's Mark and Instead Grant Summary Judgment in Favor of Petitioner.

In the final portion of his motion, Stoner argues that he is entitled to summary judgment on the question of whether Stoner has priority of trademark rights over Petitioner's BONGO BEAR trademark. Stoner's sole argument here is that the earliest date of use of Petitioner's BONGO BEAR mark shown in any of the documents produced by Petitioner was January 12,

2014, and this is subsequent to either of Stoner's dates of first use of 2004 or 2008. This argument is factually incorrect, even considering only the documents produced by Stoner with his cross-motion. It is also disputed by the attached Declaration of Michael A. Shafir (hereinafter, the "Shafir Decl."), which sets Petitioner's date of first use at March 1, 2003. Indeed, the evidence is clear and undisputed that Petitioner has priority of rights over Stoner, which will prevent summary judgment in favor of Stoner. The Board should deny Stoner's motion and instead grant summary judgment in favor of Petitioner.

As an initial matter, and as set out above, Stoner has failed to establish that he has made any use of his BONGO BI-LINGO BUDDY mark in connection with the '403 Services. As Stoner admits, in order to establish priority of trademark rights "a party must prove that, vis-à-vis the other party, it owns 'a mark previously used in the United States and has not been abandoned.'" (Stoner Brief at 13, citing Trademark Act Section 2, 15 U.S.C. § 1052). As set out in Section A above, Stoner has failed to come forward with any admissible evidence, which is fatal to Stoner's motion. In addition, none of the materials submitted by Stoner, when viewed in the light most favorable to Petitioner, establish any date of first use. Stoner is obviously not capable of establishing that he owns "a mark previously used", and his motion should be denied on that ground.

Even assuming Stoner has met his initial burden on summary judgment, there is firm evidence to dispute whether Stoner has priority of trademark rights. In his brief, the earliest date of first use alleged by Stoner is June 8, 2004. (See, *e.g.*, Stoner Brief at 2). However, Petitioner's trademark application for the BONGO BEAR mark lists a date of first use anywhere and in commerce of March 1, 2003. Shafir Decl. at ¶¶ 3 – 4. This trademark application was produced by Petitioner as P00151 – P00160, including Petitioner's specimens showing such use, and

Stoner himself included Petitioner's trademark application as Exhibit 21 in his motion for summary judgment. Petitioner's application, and the date of first use included therein, was also verified by a declaration. (Shafir Decl. at ¶ 15). This is solid evidence of record showing that Petitioner has priority of use over Stoner's alleged use.

Similarly, the Shafir Declaration independently sets Petitioner's date of first use at March 1, 2003. (Shafir Decl. at ¶¶ 6-7). It provides some context for the use of Petitioner's BONGO BEAR mark, reaffirms the date of first use, and attaches additional specimens showing Petitioner's use of the BONGO BEAR mark. (*Id.*). Attached to the Declaration are two additional documents previously produced by Petitioner in this case (P00164-P00165), which were also attached by Stoner in Exhibit 21 of his motion for summary judgment. Again, this is evidence of record is clear that Stoner's alleged June 8, 2004 priority date does not precede Petitioner's March 1, 2003 priority date, and Stoner's Motion for Summary Judgment should be denied.

In fact, pursuant to Fed. R. Civ. P. 56(f) and TBMP § 528.08, the Board has the authority to grant summary judgment in favor of Petitioner on this issue of priority. Stoner has not alleged anywhere a date of first use earlier than June 8, 2004. Even putting aside all the issues raised above about Stoner's evidence, there is not the slightest suggestion that Stoner can prove a date of first use prior to June 8, 2004. On the other hand, there are two declarations and accompanying evidence setting Petitioner's date of first use at March 1, 2003. No reasonable fact-finder could rule in favor of Stoner on the issue of priority, and the Board should therefore grant summary judgment in favor of Petitioner.


CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that there are genuine issues of material fact, and that Stoner's motion for summary judgment should be denied in its entirety. In addition, Petitioner requests that the Board grant summary in favor of Petitioner on the issue of priority of rights.

Dated: October 21, 2015

GREENBERG TRAURIG, LLP

By: _____



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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing PETITIONER'S OPPOSITION TO STONER'S CROSS-MOTION FOR SUMMARY JUDGMENT has been served on Theodore A. Stoner by mailing said copy on October 21, 2015, via First Class Mail, postage prepaid to:

Matthew H. Swyers
The Trademark Company PLLC
344 Maple Ave. W, Suite 151
Vienna, VA 22180



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Cancellation No. 92059305

Mark: BONGO BI-LINGO BUDDY

Reg. No.: 3,700,403

Registered: October 20, 2009

I, Michael A. Shafir, of full age, declare as follows:

1. I am the Vice President and General Counsel of MWR Holdings, LLC, Petitioner in this action (hereinafter "Petitioner").

2. In my role as Vice President and General Counsel of Petitioner, I have personal knowledge of Petitioner's branding activities, including Petitioner's use of the BONGO BEAR trademark.

3. On December 18, 2013 Petitioner filed a U.S. trademark application for the BONGO BEAR trademark, which was given Serial No. 86/146,757. A true and correct copy of that application was produced during discovery by Petitioner and is attached hereto as Exhibit 1.

4. Petitioner's BONGO BEAR application was filed based on use in commerce, and included dates of first use anywhere and in commerce of at least as early as March 1, 2003.

5. The information in Petitioner's BONGO BEAR application was verified by a declaration included in the application, signed by Petitioner's attorney at the time, John G. Tutunjian.

6. Petitioner uses the BONGO BEAR trademark as part of its MUSIC 4 ME program, to help children expend energy in a positive way through musical instruments and playing fun songs.

7. Petitioner has used the BONGO BEAR trademark in connection with “entertainment services, namely live theatrical performances featuring electronically animated characters for use in child development and personal appearances by a costumed character” since at least as early as March 1, 2003 and continuously thereafter.

8. Petitioner produced several documents showing the mark as actually used in the sale or advertising of the services recited in Petitioner’s BONGO BEAR trademark application. True and correct copies of those documents are attached hereto as Exhibit 2.

I declare under the penalty of perjury that the foregoing statements are true and correct.

Executed on this 19th day of October, 2015.



Michael A. Shafir
Vice President and General Counsel
MWR Holdings, LLC

EXHIBIT 1

MWR Holdings, LLC v. Theodore A. Stoner
Cancellation No. 92059305
Declaration of Michael A. Shafir

Trademark/Service Mark Application, Principal Register

Serial Number: 86146757

Filing Date: 12/18/2013

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	86146757
MARK INFORMATION	
*MARK	BONGO BEAR
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
LITERAL ELEMENT	BONGO BEAR
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font, style, size, or color.
REGISTER	Principal
APPLICANT INFORMATION	
*OWNER OF MARK	MWR Holdings, LLC
INTERNAL ADDRESS	Suite 700
*STREET	4855 Technology Way
*CITY	Boca Raton
*STATE (Required for U.S. applicants)	Florida
*COUNTRY	United States
*ZIP/POSTAL CODE (Required for U.S. applicants only)	33431

LEGAL ENTITY INFORMATION	
TYPE	limited liability company
STATE/COUNTRY WHERE LEGALLY ORGANIZED	Delaware
GOODS AND/OR SERVICES AND BASIS INFORMATION	
INTERNATIONAL CLASS	041
* IDENTIFICATION	ENTERTAINMENT SERVICES, NAMELY LIVE THEATRICAL PERFORMANCES FEATURING ELECTRONICALLY ANIMATED CHARACTERS FOR USE IN CHILD DEVELOPMENT AND PERSONAL APPEARANCES BY A COSTUMED CHARACTER
FILING BASIS	SECTION 1(a)
FIRST USE ANYWHERE DATE	At least as early as 03/01/2003
FIRST USE IN COMMERCE DATE	At least as early as 03/01/2003
SPECIMEN FILE NAME(S)	
ORIGINAL PDF FILE	SPE0-96572130-094224999 . Bongo Bear Costume.indd.pdf
CONVERTED PDF FILE(S) (1 page)	\\TICRS\EXPORT16\IMAGEOUT16\861\467\86146757\xml1\APP0003.JPG
SPECIMEN DESCRIPTION	advertising flyer
ATTORNEY INFORMATION	
NAME	John G. Tutunjian
ATTORNEY DOCKET NUMBER	319-93b
FIRM NAME	Tutunjian & Bitetto, P.C.
INTERNAL ADDRESS	Suite 302
STREET	425 Broadhollow Road
CITY	Melville
STATE	New York
COUNTRY	United States

ZIP/POSTAL CODE	11747
PHONE	631-844-0080
FAX	631-844-0081
EMAIL ADDRESS	Trademarks@tb-iplaw.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
CORRESPONDENCE INFORMATION	
NAME	John G. Tutunjian
FIRM NAME	Tutunjian & Bitetto, P.C.
INTERNAL ADDRESS	Suite 302
STREET	425 Broadhollow Road
CITY	Melville
STATE	New York
COUNTRY	United States
ZIP/POSTAL CODE	11747
PHONE	631-844-0080
FAX	631-844-0081
EMAIL ADDRESS	Trademarks@tb-iplaw.com;John@tb-iplaw.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
FEE INFORMATION	
NUMBER OF CLASSES	1
FEE PER CLASS	325
*TOTAL FEE DUE	325
*TOTAL FEE PAID	325
SIGNATURE INFORMATION	
SIGNATURE	/j. tutunjian/
SIGNATORY'S NAME	John Tutunjian

SIGNATORY'S POSITION	attorney
DATE SIGNED	12/18/2013

Trademark/Service Mark Application, Principal Register

Serial Number: 86146757

Filing Date: 12/18/2013

To the Commissioner for Trademarks:

MARK: BONGO BEAR (Standard Characters, see [mark](#))

The literal element of the mark consists of BONGO BEAR.

The mark consists of standard characters, without claim to any particular font, style, size, or color.

The applicant, MWR Holdings, LLC, a limited liability company legally organized under the laws of Delaware, having an address of

Suite 700,
4855 Technology Way
Boca Raton, Florida 33431
United States

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended, for the following:

International Class 041: ENTERTAINMENT SERVICES, NAMELY LIVE THEATRICAL PERFORMANCES FEATURING ELECTRONICALLY ANIMATED CHARACTERS FOR USE IN CHILD DEVELOPMENT AND PERSONAL APPEARANCES BY A COSTUMED CHARACTER

In International Class 041, the mark was first used by the applicant or the applicant's related company or licensee or predecessor in interest at least as early as 03/01/2003, and first used in commerce at least as early as 03/01/2003, and is now in use in such commerce. The applicant is submitting one(or more) specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a(n) advertising flyer.

Original PDF file:

[SPE0-96572130-094224999_._Bongo_Bear_Costume.indd.pdf](#)

Converted PDF file(s) (1 page)

[Specimen File1](#)

The applicant's current Attorney Information:

John G. Tutunjian of Tutunjian & Bitetto, P.C.

Suite 302
425 Broadhollow Road
Melville, New York 11747

United States

The attorney docket/reference number is 319-93b.

The applicant's current Correspondence Information:

John G. Tutunjian

Tutunjian & Bitetto, P.C.

Suite 302

425 Broadhollow Road

Melville, New York 11747

631-844-0080(phone)

631-844-0081(fax)

Trademarks@tb-iplaw.com;John@tb-iplaw.com (authorized)

A fee payment in the amount of \$325 has been submitted with the application, representing payment for 1 class(es).

Declaration

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Declaration Signature

Signature: /j. tutunjian/ Date: 12/18/2013

Signatory's Name: John Tutunjian

Signatory's Position: attorney

RAM Sale Number: 86146757

RAM Accounting Date: 12/18/2013

Serial Number: 86146757

Internet Transmission Date: Wed Dec 18 09:47:32 EST 2013

TEAS Stamp: USPTO/BAS-96.57.2.130-201312180947321235

72-86146757-50074a6345962baf6af3fd4e4c21

177461a73442c4febd68e6f737fb9bffb383f8-C

C-9178-20131218094224999492

BONGO BEAR



**Bongo Bear will be
coming to Woodstock on
January 12th, 2014 for a
Music 4 Me lesson!
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WWW.THELEARNINGEXPERIENCE.COM

BONGO BEAR



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3338 TRICKUM ROAD • WOODSTOCK, GA 30188 • (678) 494-9173

WWW.THELEARNINGEXPERIENCE.COM

EXHIBIT 2

MWR Holdings, LLC v. Theodore A. Stoner
Cancellation No. 92059305
Declaration of Michael A. Shafir



[Home](#) / [Curriculum & Enrichment Programs](#) / [Enrichment Programs](#)



Enrichment Programs

The Learning Experience® is devoted to cultivating creative, compassionate, and innovative thinkers. Our enrichment kit programs serve as fundamental components to help achieve that goal. Music, math, science, dance, Yoga, performing arts, and physical fitness are all components of our exceptional Charlie Choo Choo® enrichment series. These programs encourage children to explore different avenues of learning. Because at TLE®, we believe that what is good for one child, is good for all children. Unlike other child care centers, our enrichment programs are included in the cost of regular tuition. Charlie Choo Choo® enrichment programs offer a unique approach to education geared toward broadening the children's scope of learning. The enrichment programs are offered through unique kits that are given to each child. These enrichment kits are packed with tools designed to assist TLE® teachers with implementing the enrichment programs inside their own classrooms. This approach gives TLE® teachers the flexibility to incorporate the thematic activities into the core TLE® curriculum. The learning experiences that these kits offer do not stop at the end of each 12-week session. Afterwards, the children get to bring their kits home to share what they have learned with their parents and to continue to use the resources for further learning.

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

MWR HOLDINGS, LLC,

Petitioner,

v.

THEODORE A. STONER,

Registrant.

Cancellation No. 92059305

Mark: BONGO BI-LINGO BUDDY

Reg. No.: 3,700,403

Registered: October 20, 2009

I, William W. Stroeve, of full age, declare as follows:

1. I am Of Counsel at Greenberg Traurig, LLP, attorneys for Petitioner MWR Holdings, LLC in this action. I am familiar with the facts set forth below and submit this Declaration accordingly.

2. On October 2, 2014, Petitioner served a first set of interrogatories on Stoner. A true and correct copy of those interrogatories is attached hereto as Exhibit 1.

3. On March 11, 2015, Registrant Theodore A. Stoner ("Stoner") served his responses to those interrogatories. A true and correct copy of that response is attached hereto as Exhibit 2.

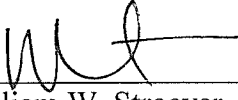
4. On October 2, 2014, Petitioner also served a first set of document requests on Stoner. A true and correct copy of those document requests is attached hereto as Exhibit 3.

I declare under the penalty of perjury that the foregoing statements are true and correct.

///

///

Executed on this 21st day of October, 2015.



William W. Stroeve

EXHIBIT 1

MWR Holdings, LLC v. Theodore A. Stoner
Cancellation No. 92059305
Declaration of William W. Stroeve

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

MWR HOLDINGS, LLC,

Petitioner,

v.

THEODORE A. STONER,

Registrant.

Cancellation No. 92059305

Mark: BONGO BI-LINGO BUDDY

Reg. No.: 3,700,403

Registered: October 20, 2009

PETITIONER'S FIRST INTERROGATORIES TO REGISTRANT

Pursuant to Rule 2.120 of the Trademark Rules of Practice and Rules 26 and 33 of the Federal Rules of Civil Procedure, Petitioner MWR Holdings, LLC ("MWR"), by its undersigned counsel, hereby requests that Registrant Theodore A. Stoner ("Stoner") answer the following interrogatories in writing and under oath, within thirty (30) days of the date of service hereof.

These interrogatories seek information as of the date of response and, as to those interrogatories addressed to matters falling within Rule 26(e)(1) & (2) of the Federal Rules of Civil Procedure, shall impose a continuing obligation on Registrant to serve upon Petitioner such further answers promptly after Registrant has acquired such knowledge.

I. INSTRUCTIONS

1. There shall be a continuing duty on Registrant to furnish additional documents in response to these document requests in accordance with Rule 26(e) of the Federal Rules of Civil Procedure.

2. All documents must be produced in a form that renders them susceptible to copying.

3. Each document should be segregated and identified by the request to which it is primarily responsive or produced as it is kept in the usual course of business.

4. If you are unable to comply fully with any request herein, comply to the extent possible and provide a detailed explanation as to why full compliance is not possible.

5. All requests herein are directed to those documents within your possession, custody or control, or within the possession, custody or control of your agents, servants and employees and your attorneys. They are also directed to those firms, corporations, partnerships, or trusts that you control and to documents in the possession, custody or control of employees, agents and representatives of such entities.

6. If any document called for is not available or accessible, is no longer in existence, or is withheld under a claim of privilege of protection against discovery, give the following information for that document:

- a. The name and title of the author(s);
- b. The name and title of each person to whom the document was addressed;
- c. The name and title of each person to whom a copy of the document was sent, directed, circulated, or distributed;
- d. The date of the document;
- e. The number of pages;

f. A brief description of the nature and subject matter of the document in sufficient detail to permit other parties to this action to assess the applicability of the asserted privilege or immunity;

g. The paragraph(s) of the request to which the document is responsive;

h. The name of each person now in possession of the document or any identical or non-identical copy;

i. The basis of the claim, privilege or protection against discovery (if applicable);

j. The reasons why the document is not available or accessible (if applicable); and

k. The reason why a document is no longer in existence (if applicable).

7. All electronic documents and records produced must be produced with an explanation sufficient to render the records and information intelligible.

II. DEFINITIONS

1. “And” and “or” shall be construed conjunctively or disjunctively, whichever makes the requests more inclusive. The term “all” shall mean “any and all,” and the term “any” shall mean “any and all.” The singular of any word or phrase shall include the plural of such word or phrase, and the plural of any word or phrase shall include the singular of such word or phrase.

2. The term “Communications” means any oral or written transmittal, correspondence, and/or receipt of words or information, whether such was by chance,

pre-arranged, formal or informal, and specifically includes but is not limited to conversations in person, telephone conversations, telegrams, telexes, facsimiles, letters, emails, reports or memoranda, formal statements, newspaper stories, notes of telephone conversations, notes of meetings, data compilations, and electronically stored data. References to Communications with business entities shall be deemed to include Communication with all officers, directors, employees, agents, attorneys or other representatives of such entities.

3. The term "Document" shall mean and include any type of written, recorded, electronic, graphic or photographic matter of any kind or character, however produced or reproduced. The term thus includes, without limiting the generality of the foregoing, all photographs, sketches, drawings, videotapes, audiotapes, letters, telegrams, telexes, facsimiles, electronic mail, correspondence, brochures, manuals, press releases, transcripts of interviews, transcripts of speeches, product guides, contracts, consulting agreements, other agreements, business plans, deeds, drafts, work papers, plans, blueprints, specifications, comparisons, surveys, data sheets, analyses, calculations, files (and their contents), notes to the files, reports, publications, mechanical and electronic sound recordings or transcripts thereof, calendar or diary entries, memoranda of telephone or personal conversations or of meetings or conferences, maps, studies, reports, charts, interoffice communications, minutes of meetings, articles, announcements, ledgers, vouchers, checks, receipts and invoices, tax records and forms, court pleadings and papers, discovery requests and responses including originals and copies of any of the foregoing, and any material underlying, supporting or used in preparing any Document.

4. The term “Entity” includes organizations, corporations, partnerships, associations, joint ventures and any other individual or group of individuals which has the purpose of conducting business.

5. The word “Identify”, or any variation of the word Identify, shall mean to specify the full name; present position and business affiliation; last known physical address (including apartment number, if applicable); email address; telephone number and facsimile number with respect to a Person. In the case of a company, the word Identify shall mean to specify the name; officers or other persons having knowledge of the matter with respect to which the company is named; place of incorporation; address and principal place of business. In the case of a “document”, the word Identify shall mean to specify the persons originating and preparing it; the sender; its general type (e.g., letter, memo, report, invoice, etc.); title; identifying number; general nature of its subject matter; addressees and recipients; date(s) of preparation; dates and manner of transmission, distribution and publication; location of each copy (including title, index number and location of the file in which it is kept or from which it was removed); present custodian or person responsible for its filing or other disposition; and persons who can authenticate or Identify it and, if privilege against production is claimed, the specific basis therefore and a complete specification and description of every fact upon which the claim of privilege is based.

6. The term “Person” includes any natural person, firm, association, organization, partnership, business, trust, governmental entity, joint venture, corporation or public entity. Additionally, the singular and plural forms are used interchangeably, as are the masculine and feminine forms.

7. The terms “Petitioner” or “MWR” means MWR Holdings, LLC, and shall include any officers, directors, corporate parents, subsidiaries, affiliates, predecessors or successors of MWR Holdings, LLC, as well as any employees, partners, agents, sales representatives, attorneys and all other persons acting or purporting to act on behalf of said entities, inclusively.

8. The terms “Registrant” or “Stoner” mean Theodore A. Stoner, and shall include any employees, representatives, agents, heirs, successors and assigns of Theodore A. Stoner, as well as any other persons acting or purporting to act on behalf of said entities, inclusively.

9. A Document “Refers” to a subject if, for example, it constitutes, comprises, describes, sets forth, reflects, analyzes, refers to, evidences, comments upon, mentions, is connected to, discusses, contains data relating to, or pertains to the subject.

10. As used herein, “Registrant’s Mark” refers to the mark identified in Registrant’s Trademark Registration, Reg. No. 3,700,403, namely, BONGO BI-LINGO BUDDY.

11. The term “Registrant’s Services” shall refer to each of the services identified in Registrant’s Trademark Registration, Reg. No. 3,700,403, namely: “Entertainment in the nature of live theatrical performances by mixed media of live characters, puppetry and animation for children; Organizing cultural events for children; Education services, namely, providing professional training in the field of bilingual learning.”

12. The term “Petitioner’s Mark” shall refer to the mark identified in Petitioner’s Trademark Application, Serial No. 86/146,757, namely BONGO BEAR.

12. All documents and things concerning any trademark searches done by or on behalf of Registrant with respect to Registrant's Mark.

13. All documents and things concerning any trademark searches done by or on behalf of Registrant with respect to Petitioner's Mark.

14. All agreements, licenses, contracts, consents to use, correspondence or other documents concerning or authorizing use of Registrant's Mark by a third party.

15. All documents and things concerning any administrative proceeding, or civil action in the United States involving Registrant's Mark.

16. All documents and things containing the phrase "Bongo Bi-Lingo Buddy".

17. All documents and things supporting or justifying any denial by Registrant of any of Petitioner's First Requests for Admission.

Dated: October 2, 2014

GREENBERG TRAURIG, LLP

By: 

William W. Stroeve
200 Park Avenue
P.O. Box 677
Florham Park, NJ 07932-0677
Tel. 973-443-3524
Fax 973-295-1291
stroeve@gtlaw.com

Attorneys for Petitioner
MWR Holdings, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing First Interrogatories to Registrant has been served on Theodore A. Stoner by mailing said copy on October 2, 2014, via First Class Mail, postage prepaid to:

Matthew H. Swyers
The Trademark Company PLLC
344 Maple Ave. W, Suite 151
Vienna, VA 22180


Susan Schuchard

EXHIBIT 2

MWR Holdings, LLC v. Theodore A. Stoner
Cancellation No. 92059305
Declaration of William W. Stroeve

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
The Trademark Trial and Appeal Board**

In the matter of U.S. Registration 3,700,403
For the mark BONGO BI-LINGO BUDDY
Registered on the Principal Register on October 20, 2009

MWR Holdings, LLC,	:	
	:	
Petitioner,	:	
	:	
vs.	:	Cancellation No. 92059305
	:	
Stoner, Theodore A.,	:	
	:	
Registrant.	:	

**REGISTRANT’S ANSWERS AND OBJECTIONS TO
PETITIONER’S FIRST SET OF INTERROGATORIES**

TO: MWR HOLDINGS, LLC c/o William W. Stroeever, Greenberg Traurig, LLP, 200
Park Ave, Florham Park, NJ 07932.

FROM: THEODORE A. STONER c/o Matthew H. Swyers, Esq., The Trademark
Company, PLLC, 344 Maple Avenue West, PBM 151, Vienna, VA 22180.

COMES NOW the Registrant Theodore A. Stoner (hereinafter “Registrant”) and provides the
instant Answers to Petitioner MWR Holdings, LLC’s (hereinafter “Petitioner”) First Set of
Interrogatories providing as follows:

INTERROGATORIES

INTERROGATORY NO. 1:

Identify each individual involved on behalf of Registrant in the provision of services under Registrant's
Mark.

ANSWER: Theodore A. Stoner
127 West Fairbanks Ave, #492
Winter Park, FL 32789

INTERROGATORY NO. 2:

Describe in detail the circumstances surrounding Registrant's alleged first use of Registrant's Mark anywhere, which purportedly occurred on June 8, 2004.

ANSWER: Registrant first used Registrant's Mark at a New York trade show where Registrant performed a live performance under Registrant's Mark.

INTERROGATORY NO. 3:

Describe in detail the circumstances surrounding Registrant's alleged first use of Registrant's Mark in commerce, which purportedly occurred on June 18, 2008.

ANSWER: Upon further review Registrant first used Registrant's Mark in interstate commerce at the New York trade show that took place on June 8, 2004 where Registrant first performed the show outside of Colorado.

INTERROGATORY NO. 4:

Identify each individual who participated in the creation and adoption of Registrant's Mark.

ANSWER: Theodore A. Stoner
127 West Fairbanks Ave, #492
Winter Park, FL 32789

INTERROGATORY NO. 5:

For each month from Registrant's date of first use of Registrant's Mark until the present, state the sales volume of services provided by Registrant under Registrant's Mark.

ANSWER: Registrant does not have any sales figures relating to Registrant's Services at issue in this proceeding as the International Class 41 services are offered to promote Registrant's Mark in connection with Registrant's other goods.

INTERROGATORY NO. 6:

Describe the target class of consumers to whom Registrant provides Registrant's Services.

ANSWER: Registrant targets children ages 3 to 6.

INTERROGATORY NO. 7:

Identify the date Registrant first became aware of Petitioner's use of Petitioner's Mark in the United States.

ANSWER: Registrant first became aware of Petitioner's use of Petitioner's Mark in the United States when Petitioner filed the instant Cancellation Proceeding on June 5, 2014.

INTERROGATORY NO. 8:

Describe with particularity all advertising conducted by Registrant relating to Registrant's Mark.

ANSWER: Registrant has advertised Registrant's Mark through Registrant's websites, social media accounts, personal sales and live shows to various children's institutions, public relations articles, and live trade shows.

INTERROGATORY NO. 9:

For each year since Registrant's date of first use of Registrant's Mark until the present, state the annual advertising and promotion expenditures in the United States for Registrant's Services.

ANSWER: Registrant has spent about \$5,000 average annually since first beginning to use Registrant's Mark in advertising and promotion expenditures.

INTERROGATORY NO. 10:

State all facts upon which Registrant intends to rely to prove that there is no likelihood of confusion between Registrant's Mark and Petitioner's Mark.

ANSWER: Applicant objects to the instant request on the grounds that it is overly broad and burdensome given the inclusion of the term "All" and that it calls for information protected by the attorney client privilege and / or work product doctrine.

Respectfully submitted this 11th day of March, 2015.

THE TRADEMARK COMPANY, PLLC

/Matthew H. Swyers/

Matthew H. Swyers, Esq.

344 Maple Avenue West, Suite 151

Vienna, VA 22180

Tel. (800) 906-8626

Facsimile (270) 477-4574

mswyers@TheTrademarkCompany.com

Counsel for Registrant

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
The Trademark Trial and Appeal Board**

In the matter of U.S. Registration 3,700,403
For the mark BONGO BI-LINGO BUDDY
Registered on the Principal Register on October 20, 2009

MWR Holdings, LLC,	:	
	:	
Petitioner,	:	
	:	
vs.	:	Cancellation No. 92059305
	:	
Stoner, Theodore A.,	:	
	:	
Registrant.	:	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of the foregoing this 11th day of March, 2015,
to be served, via first class mail, postage prepaid, upon:

William W. Stroeve
Greenberg Traurig, LLP
200 Park Ave
Florham Park, NJ 07932

/Matthew H. Swyers/
Matthew H. Swyers

EXHIBIT 3

MWR Holdings, LLC v. Theodore A. Stoner
Cancellation No. 92059305
Declaration of William W. Stroeve

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

MWR HOLDINGS, LLC,

Petitioner,

v.

THEODORE A. STONER,

Registrant.

Cancellation No. 92059305

Mark: BONGO BI-LINGO BUDDY

Reg. No.: 3,700,403

Registered: October 20, 2009

**PETITIONER'S FIRST REQUEST FOR THE PRODUCTION OF DOCUMENTS
TO REGISTRANT**

Pursuant to Rule 2.120 of the Trademark Rules of Practice and Rules 26 and 33 of the Federal Rules of Civil Procedure, Petitioner MWR Holdings, LLC ("MWR"), by its undersigned counsel, hereby requests that Registrant Theodore A. Stoner ("Stoner") serve a written response to this request within thirty (30) days of the date of service of this request as provided in said Rules, and that Registrant produce the documents and things specified below for inspection and copying by Petitioner at the offices of Greenberg Traurig, LLP, 200 Park Avenue, P.O. Box 677, Florham Park, NJ 07932.

I. INSTRUCTIONS

1. There shall be a continuing duty on Registrant to furnish additional documents in response to these document requests in accordance with Rule 26(e) of the Federal Rules of Civil Procedure.

2. All documents must be produced in a form that renders them susceptible to copying.

3. Each document should be segregated and identified by the request to which it is primarily responsive or produced as it is kept in the usual course of business.

4. If you are unable to comply fully with any request herein, comply to the extent possible and provide a detailed explanation as to why full compliance is not possible.

5. All requests herein are directed to those documents within your possession, custody or control, or within the possession, custody or control of your agents, servants and employees and your attorneys. They are also directed to those firms, corporations, partnerships, or trusts that you control and to documents in the possession, custody or control of employees, agents and representatives of such entities.

6. If any document called for is not available or accessible, is no longer in existence, or is withheld under a claim of privilege of protection against discovery, give the following information for that document:

- a. The name and title of the author(s);
- b. The name and title of each person to whom the document was addressed;
- c. The name and title of each person to whom a copy of the document was sent, directed, circulated, or distributed;
- d. The date of the document;
- e. The number of pages;
- f. A brief description of the nature and subject matter of the document in sufficient detail to permit other parties to this action to assess the applicability of the asserted privilege or immunity;

g. The paragraph(s) of the request to which the document is responsive;

h. The name of each person now in possession of the document or any identical or non-identical copy;

i. The basis of the claim, privilege or protection against discovery (if applicable);

j. The reasons why the document is not available or accessible (if applicable); and

k. The reason why a document is no longer in existence (if applicable).

7. All electronic documents and records produced must be produced with an explanation sufficient to render the records and information intelligible.

II. DEFINITIONS

1. “And” and “or” shall be construed conjunctively or disjunctively, whichever makes the requests more inclusive. The term “all” shall mean “any and all,” and the term “any” shall mean “any and all.” The singular of any word or phrase shall include the plural of such word or phrase, and the plural of any word or phrase shall include the singular of such word or phrase.

2. The term “Communications” means any oral or written transmittal, correspondence, and/or receipt of words or information, whether such was by chance, pre-arranged, formal or informal, and specifically includes but is not limited to conversations in person, telephone conversations, telegrams, telexes, facsimiles, letters, emails, reports or memoranda, formal statements, newspaper stories, notes of telephone

conversations, notes of meetings, data compilations, and electronically stored data. References to Communications with business entities shall be deemed to include Communication with all officers, directors, employees, agents, attorneys or other representatives of such entities.

3. The term “Document” shall mean and include any type of written, recorded, electronic, graphic or photographic matter of any kind or character, however produced or reproduced. The term thus includes, without limiting the generality of the foregoing, all photographs, sketches, drawings, videotapes, audiotapes, letters, telegrams, telexes, facsimiles, electronic mail, correspondence, brochures, manuals, press releases, transcripts of interviews, transcripts of speeches, product guides, contracts, consulting agreements, other agreements, business plans, deeds, drafts, work papers, plans, blueprints, specifications, comparisons, surveys, data sheets, analyses, calculations, files (and their contents), notes to the files, reports, publications, mechanical and electronic sound recordings or transcripts thereof, calendar or diary entries, memoranda of telephone or personal conversations or of meetings or conferences, maps, studies, reports, charts, interoffice communications, minutes of meetings, articles, announcements, ledgers, vouchers, checks, receipts and invoices, tax records and forms, court pleadings and papers, discovery requests and responses including originals and copies of any of the foregoing, and any material underlying, supporting or used in preparing any Document.

4. The term “Entity” includes organizations, corporations, partnerships, associations, joint ventures and any other individual or group of individuals which has the purpose of conducting business.

5. The word “Identify”, or any variation of the word Identify, shall mean to specify the full name; present position and business affiliation; last known physical address (including apartment number, if applicable); email address; telephone number and facsimile number with respect to a Person. In the case of a company, the word Identify shall mean to specify the name; officers or other persons having knowledge of the matter with respect to which the company is named; place of incorporation; address and principal place of business. In the case of a “document”, the word Identify shall mean to specify the persons originating and preparing it; the sender; its general type (e.g., letter, memo, report, invoice, etc.); title; identifying number; general nature of its subject matter; addressees and recipients; date(s) of preparation; dates and manner of transmission, distribution and publication; location of each copy (including title, index number and location of the file in which it is kept or from which it was removed); present custodian or person responsible for its filing or other disposition; and persons who can authenticate or Identify it and, if privilege against production is claimed, the specific basis therefore and a complete specification and description of every fact upon which the claim of privilege is based.

6. The term “Person” includes any natural person, firm, association, organization, partnership, business, trust, governmental entity, joint venture, corporation or public entity. Additionally, the singular and plural forms are used interchangeably, as are the masculine and feminine forms.

7. The terms “Petitioner” or “MWR” means MWR Holdings, LLC, and shall include any officers, directors, corporate parents, subsidiaries, affiliates, predecessors or successors of MWR Holdings, LLC, as well as any employees, partners, agents, sales

representatives, attorneys and all other persons acting or purporting to act on behalf of said entities, inclusively.

8. The terms “Registrant” or “Stoner” mean Theodore A. Stoner, and shall include any employees, representatives, agents, heirs, successors and assigns of Theodore A. Stoner, as well as any other persons acting or purporting to act on behalf of said entities, inclusively.

9. A Document “Refers” to a subject if, for example, it constitutes, comprises, describes, sets forth, reflects, analyzes, refers to, evidences, comments upon, mentions, is connected to, discusses, contains data relating to, or pertains to the subject.

10. As used herein, “Registrant’s Mark” refers to the mark identified in Registrant’s Trademark Registration, Reg. No. 3,700,403, namely, BONGO BI-LINGO BUDDY.

11. The term “Registrant’s Services” shall refer to each of the services identified in Registrant’s Trademark Registration, Reg. No. 3,700,403, namely: “Entertainment in the nature of live theatrical performances by mixed media of live characters, puppetry and animation for children; Organizing cultural events for children; Education services, namely, providing professional training in the field of bilingual learning.”

12. The term “Petitioner’s Mark” shall refer to the mark identified in Petitioner’s Trademark Application, Serial No. 86/146,757, namely BONGO BEAR.

III. REQUESTS

1. All documents identified in response to Petitioner’s First Set of Interrogatories.

2. All documents and things concerning the prosecution of U.S. Trademark Application Serial No. 78/812,529.

3. All documents and things sufficient to identify each occasion on which Registrant has provided Registrant's Services under Registrant's Mark.

4. All documents and things concerning Registrant's alleged first use of Registrant's Mark anywhere, which purportedly occurred on June 8, 2004.

5. All documents and things concerning Registrant's alleged first use of Registrant's Mark in commerce, which purportedly occurred on June 18, 2008.

6. All documents and things concerning the creation and adoption of Registrant's Mark.

7. All documents and things concerning the occasion Registrant first became aware of Petitioner's use of Petitioner's Mark in the United States.

8. All documents and things concerning any advertising conducted by Registrant relating to Registrant's Mark.

9. All documents and things concerning the channels of trade through which Registrant provides Registrant's Services.

10. All documents and things that support Registrant's claim that it has used Registrant's Mark in connection with each of Registrant's Services in the United States.

11. All invoices, contracts, agreements, purchase orders and/or purchase receipts which reflect or evidence Registrant's use of Registrant's Mark.

12. All documents and things concerning any trademark searches done by or on behalf of Registrant with respect to Registrant's Mark.

13. All documents and things concerning any trademark searches done by or on behalf of Registrant with respect to Petitioner's Mark.

14. All agreements, licenses, contracts, consents to use, correspondence or other documents concerning or authorizing use of Registrant's Mark by a third party.

15. All documents and things concerning any administrative proceeding, or civil action in the United States involving Registrant's Mark.

16. All documents and things containing the phrase "Bongo Bi-Lingo Buddy".

17. All documents and things supporting or justifying any denial by Registrant of any of Petitioner's First Requests for Admission.

Dated: October 2, 2014

GREENBERG TRAURIG, LLP

By: 

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Attorneys for Petitioner
MWR Holdings, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing First Request for Production of Documents to Registrant has been served on Theodore A. Stoner by mailing said copy on October 2, 2014, via First Class Mail, postage prepaid to:

Matthew H. Swyers
The Trademark Company PLLC
344 Maple Ave. W, Suite 151
Vienna, VA 22180


Susan Schuchard